Senate Rules Committee
Hearing on "Legislative Proposals to Change Senate Procedures"
Testimony of Senator Tom Udall
September 22, 2010

Summary

I believe more strongly than ever that our Senate rules are broken. And from the testimony we've heard over the last few months, and from all of the feedback I've received on my own proposal, I know that I'm not alone.

I commend my Senate colleagues who brought their own solutions before this committee. Like me, they've seen for themselves the unprecedented obstruction we've faced over the last few years. In July we heard about reform proposals by Senators Lautenberg and Bennet and today we'll discuss Senator Harkin's proposal to amend the cloture rule.

But I would like to be clear that my proposal differs from the others. Unlike those specific changes to the rules, which I think all deserve our consideration, my proposal is to make each Senate accountable for all of our rules. This is what the Constitution provides for, and it is what our Founders intended.

The Rules are not broken for one party, or for only the majority. Today the Democrats lament the abuse of the filibuster and the Republicans complain that they are not allowed to offer amendments to legislation. Five years ago, those roles were reversed. Rather than continue on this destructive path, we should adopt rules that allow a majority to act, while protecting the minority's right to be heard.

Rule XXII is the most obvious example of the need for reform, and the one my colleagues' proposals focus on. It also demonstrates what happens when the members of the current Senate have no ability to amend the rules adopted long ago – the rules get abused. I've said this before, but it bears repeating. Of the 100 members of the Senate, only two of us have had the opportunity to vote on the cloture requirement in Rule XXII – Senators Inouye and Leahy.

So if 98 of us haven't voted on the rule, what's the effect? Well, the effect is that we're not held accountable when the rule gets abused. And with a requirement of 67 votes for any rules change, that's a whole lot of power without restraint.

But we can change this. We can restore accountability to the Senate. I believe the Constitution provides a solution to this problem. Many of my colleagues, as well as constitutional scholars, agree with me that a simple majority of the Senate can end debate and adopt its rules at the beginning of a new Congress.

Critics of my position argue that the rules can only be changed in accordance with the current rules, and that Rule XXII requires two-thirds of Senators present and voting to agree to end debate on a change to the Senate rules.

But members of both parties have rejected this argument on many occasions since the rule was first adopted in 1917. In fact, advisory rulings by Vice Presidents Nixon, Humphrey, and Rockefeller, sitting as the President of the Senate, have stated that a Senate at the beginning of a Congress is not bound by the cloture requirement imposed by a previous Senate and may end debate on a proposal to adopt or amend the Senate's Standing Rules by a majority vote.

This is what our founders intended. Article I, Section 5 of the Constitution clearly states that "each House may determine the Rules of its Proceedings." There is no requirement for a supermajority to adopt our rules, and the Constitution makes it very clear when a supermajority is required to act. Therefore, any rule that prevents a majority in future Senates from being able to change or amend rules adopted in the past is unconstitutional.

The fact that we are bound by a supermajority requirement that was established 93 years ago also violates the common law principle that one legislature cannot bind its successors. This principle dates back hundreds of years and has been upheld by the Supreme Court on numerous occasions.

So first thing, at the beginning of the next Congress, I will move for the Senate to end debate and adopt its rules by a simple majority. At a previous hearing, one of my colleagues on the Republican side questioned whether I would be willing to still do this if my party is in the minority. The answer is yes.

This is not a radical idea – it is the Constitutional Option. It's what the House does. It's what most legislatures do. And it's what the U.S. Senate should do to make sure we're accountable … both to our colleagues, and to the American people.

And it is not the nuclear option, which was a recent attempt by Republicans to have the filibuster declared unconstitutional in the middle of a Congress. The Constitutional Option has a history dating back to 1917 and has been the catalyst for bipartisan rules reform several times since then.

The Constitutional Option is our chance to fix rules that are being abused – rules that have encouraged obstruction like none ever seen before in this chamber. And amending our rules will not, as some have contended, make the Senate no different than the House. First of all, I doubt that a majority would vote to completely abolish the filibuster rule – most of us want reform, but still understand the role of the minority in the Senate. But if they did, the Senate was a uniquely deliberative chamber before the rule was adopted in 1917. Our Framers took great steps to make the Senate a distinct body from the House, but requiring a supermajority to take any action was not one of them.

So in January, on the first day of the new Congress, we should have a thorough and candid debate about our rules. We should discuss options for amending the rules, such as Senator Harkin's proposal. And after we identify solutions that will allow the body to function as our founders intended, and a majority decides that we have debated enough, we should vote on our rules.

And even if we adopt the same rules that we have right now, we're accountable to them. We can't complain about the rules, because we voted on them. And if someone's considering abusing the rules, they'll think twice about it, because they'll be held accountable.

We need to come together on this for the good of the Senate and the good of the country. It's the job the American people sent us here to do.

Thank you.

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Thank you Mr. Chairman for convening this fifth hearing. As members of this committee, over the past few months we've heard from a distinguished group of men and women who have come before us to testify about the state of our Senate's rules.

I thank them for sharing their knowledge and expertise. They've helped us further define the challenges we face. As I take my turn in this chair today, I believe more strongly than ever that our Senate rules are broken. And from the testimony we've heard over the last few months – and from all of the feedback I've received on my own proposal – I know that I'm not alone.

I commend my Senate colleagues who brought their own solutions before this committee. Like me, they've seen for themselves the unprecedented obstruction we've faced over the last few years. In July we heard about reform proposals by Senators Lautenberg and Bennet and today we'll discuss Senator Harkin's proposal to amend the cloture rule.

But I would like to be clear that my proposal differs from the others. Unlike those specific changes to the rules, which I think all deserve our consideration, my proposal is to make each Senate accountable for all of our rules. This is what the Constitution provides for, and it is what our Founders intended.

These hearings have shown us that the Rules are broken. But they are not broken for one party, or for only the majority. Today the Democrats lament the abuse of the filibuster and the Republicans complain that they are not allowed to offer amendments to legislation. Five years ago, those roles were reversed. Rather than continue on this destructive path, we should adopt rules that allow a majority to act, while protecting the minority's right to be heard.

Rule XXII – more commonly known as the filibuster or cloture rule – is the most obvious example of the need for reform, and the one my colleagues' proposals focus on. It also demonstrates what happens when the members of the current Senate have no ability to amend the rules adopted long ago – the rules get abused. I've said this before, but it bears repeating. Of the 100 members of the Senate, only two of us have had the opportunity to vote on the cloture requirement in Rule XXII – Senators Inouye and Leahy.

So if 98 of us haven't voted on the rule, what's the effect? Well, the effect is that we're not held accountable when the rule gets abused. And with a requirement for two-thirds of the Senate to end debate on any rules change, that's a whole lot of power without restraint.

I believe that the requirement in Rule XXII for two-thirds to vote to end debate on a rules change is unconstitutional, is contrary to the Framers' intent, and violates the longstanding common law principle that one legislature cannot bind its successors. I will discuss each of these issues in more detail and then explain how the Senate can take action, as it has in the past, to address the problem.

The Constitution, the Framers, and the Original Senate Rules

Article I, Section 5 of the Constitution states, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." It couldn't be clearer that a supermajority is not needed for the Senate to determine its rules, as the very same sentence requires for the Senate to expel a member.

In the Federalist Papers, James Madison and Alexander Hamilton explained that the Constitution purposefully required only a simple majority of the Senate to take action, except in very limited, extraordinary circumstances – for significant issues such as impeachments, expelling members of Congress, overriding a presidential veto, ratifying treaties, and amending the Constitution. As Madison stated in Federalist 58, had a general supermajority requirement been in the Constitution, "an interested minority might take advantage to screen themselves from equitable sacrifices. . . . [or] to extort unreasonable indulgences" from the majority as the price of their support.

Hamilton explained in Federalist 22 that the inclusion of a supermajority voting requirement would require "the majority, in order that something may be done, [to] conform to the views of the minority; and thus . . . the smaller numbers will overrule the greater." Hamilton said, almost prophetically, that a minority of legislators could use a supermajority requirement to "embarrass the administration, … destroy the energy of government," and that the decisions of the majority in Congress would then be subject to "the pleasure, caprice or artifices of an insignificant, turbulent, or corrupt junta . . . [for] the deliberations and decisions of a respectable majority." He further argued that "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail." Madison and Hamilton's fears of minority control have become today's reality.

The original Senate Rules also demonstrate that the Framers intended for the body to operate as a majoritarian institution. Those rules, adopted under Article I, section 5 of the Constitution, included a provision allowing a senator to make a motion "for the previous question." If passed, the motion allowed a simple majority of senators to halt debate on a pending issue. This simple rule for limiting debate was inadvertently dropped in 1806 – perhaps for lack of need – and the Senate entered a period with no means to limit debate. It wasn't until the 1830s that the Senate saw the first filibusters, as members recognized that the lack of any rule to limit debate could be used to effectively block legislation opposed by even a minority of the minority.

Entrenchment of Senate Rules

After years of operating without a formal rule to cut off debate, the Senate adopted Rule XXII, which permitted cloture on "any pending measure" at the will of two-thirds of all Senators present and voting. It was the adoption of this rule that had the effect of entrenching the Senate rules against future changes. Any future attempt to change the rules would require two-thirds of Senators to vote to end debate – thus, a majority could no longer exercise its constitutional right to "determine the Rules of its Proceedings."

Some critics of reform argue that the rules are not entrenched against change and the two-thirds requirement in Rule XXII is not unconstitutional because the final vote on any rules change is still a majority vote. They argue that the cloture requirement is only an internal Senate procedure to limit debate, not an actual vote on a rules change, so in theory a majority is always able to vote to change the rules. This is a distinction without a difference. If a majority cannot ever get to vote on a rules change because it takes a supermajority to do so, then the effect is the same – a majority is denied its constitutional right to vote on the rules.

Entrenchment of the Senate rules is not only unconstitutional, but also violates the common law principle, upheld in numerous Supreme Court opinions, that one legislature cannot bind its successors. Senators of both parties and leading constitutional law scholars have supported this conclusion on many occasions.

Senator John Cornyn wrote in a 2003 law review article that "[j]ust as one Congress cannot enact a law that a subsequent Congress could not amend by majority vote, one Senate cannot enact a rule that a subsequent Senate could not amend by majority vote."

Senator Robert Byrd, who understood the Senate rules better than anyone, stated that the original Senate adopted nineteen of its rules by a simple majority vote, and that these members "did not for one moment think, or believe, or pretend, that all succeeding Senates would be bound by that Senate." In 1975, Senator Walter Mondale stated that "[e]ven if we wanted to, we could not, under the U.S. Constitution, bind a future Congress or waive the right of a future majority." Senator Ted Kennedy said that same year that, "[t]he notion that a filibuster can be used to defeat an attempt to change the filibuster rule cannot withstand analysis. It would impose an unconstitutional prior restraint on the parliamentary procedure in the Senate. It would turn rule XXII into a Catch XXII."

Senator Cornyn held a hearing in 2003 when he was Chairman of the Subcommittee on the Constitution, Civil Rights and Property Rights of the Judiciary Committee (S. HRG. 108–227). Some of the nation's leading conservative constitutional scholars testified or submitted testimony at that hearing, and all of it supports the principle that a previous Senate cannot enact a rule that prevents a majority in a future Senate from acting. I'd like to provide some quotes from their testimony and submit the full text of their testimony into the record.

Steven Calabresi, a professor of law at Northwestern University School of Law, former law clerk for Justice Antonin Scalia, and co-founder of the Federalist Society testified that:

> "The Senate can always change its rules by majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority for rules changes, Rule XXII is unconstitutional. It is an ancient principle of Anglo–American constitutional law that one legislature cannot bind a succeeding legislature. This principle goes back to the great William Blackstone, who said in his commentary, 'Acts of Parliament derogatory from the power of subsequent Parliaments bind not.'"

Douglas Kmiec, then Dean of the Columbus School of Law at Catholic University, testified about the unconstitutional entrenchment of supermajority rules and stated:

> "We currently have in play a process where carryover rules, rules that have not been adopted by the present Senate, are requiring a supermajority to, in effect, approve and confirm a judicial nominee. As you know, to close debate, it requires 60 votes; in order to amend the rules, it requires 67. These are carryover provisions that have not been adopted by this body and by virtue of that, they pose the most serious of constitutional questions because, as I quote, Senator, the Supreme Court has long held the following: 'Every legislature possess the same jurisdiction and power as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less.'"

Dr. John Eastman, a professor of Constitutional Law at Chapman University School of Law, said at the hearing that "the use of supermajority requirements to bar the change in the rules inherited from a prior session of Congress would itself be unconstitutional."

Testimony submitted to the Committee for this hearing also supports this principle. Professor John C. McGinnis of Northwestern University and Professor Michael Rappaport of the University of San Diego School of Law stated in their written testimony that:

> "[T]he Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, all entrenchment of the filibuster rule, or of any other legislative rule or law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional."

Finally, renowned constitutional law scholar Ronald Rotunda stated in written testimony:

> "The present Senate rules that create the filibuster also purport not to allow the Senate to change the filibuster by a simple majority. However, these rules should not bind the present Senate any more than a statute that says it cannot be repealed until 60% or 67% of the Senate vote to repeal the Statute. … I do not see how an earlier Senate can bind a present Senate on this issue."

These opinions span the political spectrum – both liberals and conservatives agree that entrenchment of the rules is unconstitutional. In a 1997 law review article, esteemed constitutional scholar Erwin Chemerinsky wrote that:

> "[T[he conjunction of Rules V and XXII does exactly what all of the [Supreme Court] say[s] that the Constitution forbids: it allows one session of the Senate to

> bind later sessions to its procedure for approving legislation. Rule XXII effectively extends a supermajority requirement to the passage of any measure before it, including proposed rule changes. Rule V preserves all Senate rules from one session to the next. The Senate thus violates the Court's declaration in *Newton* by depriving 'succeeding legislature . . . [of] the same jurisdiction and power . . . as its predecessors.' Rules V and XXII unconstitutionally limit the power of those sessions which came after their enactment."

Some argue that entrenchment of the Senate rules is permissible because the Senate is a "continuing body." They claim that there is never a new Senate – because two-thirds of the members are always in office, the rules must remain in effect from one Congress to the next. I disagree with this assertion. Even if the Senate is considered to be a continuing body, it is only in a structural sense in that a quorum is always able to conduct business; there is no reason that the rules must remain in effect from one Congress to the next.

Many things change with a new Congress – it is given a new number, all of the pending bills and nominations from the previous Congress are dead, and each party may choose its leadership. If the party in the majority changes, the new Senate naturally becomes drastically different than the last.

Senators of both parties have articulated similar positions. As my esteemed colleague from Utah, Senator Hatch, stated in a National Review article in 2005:

> "The Senate has been called a 'continuing body.' Yet language reflecting this observation was included in Senate rules only in 1959. The more important, and much older, sense in which the Senate is a continuing body is its ongoing constitutional authority to determine its rules. Rulings by vice presidents of both parties, sitting as the President of the Senate, confirm that each Senate may make that decision for itself, either implicitly by acquiescence or explicitly by amendment. Both conservative and liberal legal scholars, including those who see no constitutional problems with the current filibuster campaign, agree that a simple majority can change Senate rules at the beginning of a new Congress."

I agree with Senator Hatch. The language that was added to the Standing Rules in 1959 providing that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules" was the result of a political compromise brokered by then Majority Leader Lyndon Johnson. There is no reason that it should bind any Senate after that – the Constitution doesn't allow it.

Professor Rotunda also addressed the continuing body theory in his 2003 testimony, stating:

> "Granted, the Senate, unlike the House, is often called a continuing body because only one-third of its members are elected every two years. But that does not give the Senators of a prior time (some of whom were defeated in the prior election) the right to prevent the present Senate from choosing, by simple majority, the rules governing its procedure. In other words, the Senate may be a continuing

body insofar as two-thirds of its members carry over from the prior elections, but [regarding the Senate rules] the Senate starts anew every two years."

The Constitutional Option to Fix the Problem

In 1917, a group of eleven Senators filibustered President Woodrow Wilson's Armed Ship Bill, legislation that would have authorized the arming of U.S. merchant ships during the early period of U.S. involvement in World War I. President Woodrow Wilson, responding to the filibuster stated:

> *"The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible. The remedy? There is but one remedy. The only remedy is that the rules of the Senate shall be so altered that it can act."*

In response, Montana Senator Thomas Walsh – citing Article I, Section 5 of the Constitution – introduced The Constitutional Option. Walsh argued that a newly convened Senate was not bound by the rules of the previous Senate and could adopt its own rules, including a rule to limit debate. He reasoned that every new Senate had the right to adopt rules, saying that "it is preposterous to assume that [the Senate] may deny future majorities the right to change" the rules. In response to Walsh's proposal, the Senate reached a compromise and amended Rule XXII. The compromise permitted cloture on "any pending measure" at the will of two-thirds of all Senators present and voting.

Back then, the toxic partisanship we face today had not yet seeped in, but the manipulative use of the filibuster had already taken hold. It was used to block some of the most important legislation of that time. Anti-lynching bills in 1922 and '35 and '38. Anti-race discrimination bills were blocked almost a dozen times starting in 1946.

By the 1950s, a bipartisan group of Senators had had enough. On behalf of himself and 18 others, New Mexico's Clinton Anderson, my predecessor, attempted to limit debate and control the use of a filibuster by adopting the 1917 strategy of Thomas Walsh.

Just as Senator Walsh did almost four decades earlier, Senator Anderson argued that each new Congress brings with it a new Senate entitled to consider and adopt its own rules. On January 3, 1953, Anderson moved that the Senate immediately consider the adoption of rules for the Senate of the 83rd Congress.

Anderson's motion was tabled, but he introduced it again at the beginning of the 85th Congress. In the course of that debate, Senator Hubert Humphrey presented a parliamentary inquiry to Vice-President Nixon, who was presiding over the Senate. Nixon understood the inquiry to address the basic question: "Do the rules of the Senate continue from one Congress to another?"

Noting that there had never been a direct ruling on this question from the Chair, Nixon stated that, quote, "while the rules of the Senate have been continued from one Congress to another, the

right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of a previous Congress. Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional."

Nixon went on to explain that under the Constitution, a new Senate had three options to deal with the rules at the beginning of a new session of Congress:

> (1) proceed under the rules of the previous Congress and "thereby indicate by acquiescence that those rules continue in effect,"
>
> (2) vote down a motion to adopt new rules and thereby "indicate approval of the previous rules," or
>
> (3) "vote affirmatively to proceed with the adoption of new rules."

Despite Nixon's opinion from the chair, Anderson's motion was tabled. In 1959 Anderson raised the Constitutional Option again at the start of the 86th Congress, with the support of some 30 other Senators.

This time he raised the ire of then-Majority Leader Johnson – who realized that a majority of senators might join Anderson's cause. To prevent Anderson's motion from receiving a vote, Johnson came forward with his own compromise – changing Rule XXII to reduce the required vote for cloture to "two-thirds of the Senators present and voting."

To appease a small group of Senators, Johnson also included new language. This language stated that the rules continued from one Congress to the next, unless they were changed under the rules. It was a move that would effectively bind all future Senates.

In 1975 – two years after Anderson left office – Senators Walter Mondale and James Pearson used the Constitutional Option to convince the Senate to adopt the rule we operate under today: it takes the vote of "three-fifths of all Senators duly chosen and sworn" to cut off debate or the threat of unlimited debate on all matters except a change to the rules, which still requires two-thirds of Senators present and voting.

Clinton Anderson relied on the Constitutional Option as the basis to ease or at least reconsider the cloture requirements laid out in Rule XXII. As he said in 1959, "my motion does not prejudge the nature of the rules which the senate in its wisdom may adopt, but it does declare, in effect, that the Senate of the 85th Congress is responsible for and must bear the responsibility for the rules under which the Senate will operate. That responsibility cannot be shifted back upon the Senate of past Congresses. "

As the junior senator from New Mexico, I have the honor of serving in Senator Clinton Anderson's former seat. And I have the desire to take up his commitment to the Senate and his

dedication to the principle that in each new session of Congress, the Senate should exercise its constitutional power to determine its own rules.

Let me be very clear – I am not arguing for or against any specific changes to the rules, but I do think that each Senate has the right, according to the Constitution, to determine all of its rules by a simple majority vote.

As my distinguished colleague Senator Byrd, the longest serving member in the history of Congress, once said:

> "The Constitution in article I, section 5, says that each House shall determine the rules of its proceedings. Now we are at the beginning of Congress. This Congress is not obliged to be bound by the dead hand of the past."

It is time for reform. There are many great traditions in this body that should be kept and respected, but stubbornly clinging to ineffective and unproductive procedures should not be one of them. There is another way. The Senate may choose to adopt new rules or it may choose to continue with some or all of the rules of the previous Congress. The point is that it is our choice – it is our responsibility. As Clinton Anderson said, it is a "responsibility (that) cannot be shifted back upon the Senate of past Congresses."

So in January, on the first day of the new Congress, we should have a thorough and candid debate about our rules. We should discuss options for amending the rules, such as Senator Harkin's proposal. And after we identify solutions that will allow the body to function as our founders intended, and a majority decides that we have debated enough, we should vote on our rules.

And even if we adopt the same rules that we have right now, we're accountable to them. We can't complain about the rules, because we voted on them. And if someone's considering abusing the rules, they'll think twice about it, because they'll be held accountable.

We need to come together on this for the good of the Senate and the good of the country. It's the job the American people sent us here to do.

Thank you.